

225773

Before the Surface Transportation Board

The Burlington Northern and)
Santa Fe Railway Company -)
Abandonment Exemption -) AB 6 (sub-no. 379X)
Garfield and Logan Counties,)
Oklahoma)

Reply to ODOT Motion to Supplement Record

Montoff Transportation Company LLC ("Montoff") supports the motion filed by the Oklahoma Department of Transportation ("ODOT") to supplement the record. Montoff requests leave to make the following additional supplementation, and also, as indicated below, to state no objection to postponement until October 15 of issuance of a substitute Notice of Interim Trail Use ("NITU") recognizing Montoff as substitute trail manager.

Additional Supplementation

As a follow-up to earlier calls and emails to BNSF Railway Company ("BNSF") personnel, and prior to his departure for trip abroad, Montoff's counsel filed, as required by a contract with ODOT, a motion to substitute interim trail managers for the rail line at issue in this proceeding. That motion, consistent with this Board's regulations and with Montoff's contract with ODOT, sought a substitution effective September 30. Montoff did not anticipate any further questions from BNSF, having received no indication of questions prior to the aforementioned departure.

In a Reply filed on September 3, BNSF opposed the substitution on two grounds: that it did not know if Montoff was a "qualified private organization" for 16 U.S.C. 1247(d) purposes and that it was concerned that its contractual rights in respect

to repurchase of track and ties were protected. The supplemental information below discusses these two concerns.

I.

This Board's regulations do not define "qualified private organization" under 16 U.S.C. 1247(d). So far as Montoff is aware, STB's decisions have so far never rejected a private entity seeking to railbank as unqualified. 16 U.S.C. 1247(d) basically requires that a railbanking entity be an entity that will assume managerial, tort and tax responsibility. Montoff is fully prepared to do so, and otherwise to act in accordance with the "statement of willingness" which it has filed. Furthermore, Montoff seeks to become legal owner of the premises, and thus of course will be responsible for the prescribed responsibilities, since they, after all, flow from ownership. Unless BNSF claims that its relationship with ODOT creates some kind of joint venture (BNSF has never so claimed in the railbanking context so far as Montoff is aware), it follows that BNSF can rest assured that it is no more responsible for tort, managerial, or tax matters on the line than it was under ODOT's ownership.

In general, BNSF and other railroads focus on the ability of a private entity to pay the requisite purchase price and supply the prescribed insurance coverage. Montoff is sufficiently funded to pay ODOT the contract price for the property upfront. ODOT and BNSF are assured of this for otherwise there will be no closing. Moreover, the BNSF/ODOT agreement, and the Montoff/ODOT agreement, both prescribe insurance, and Montoff, as ODOT

indicates, will supply insurance in whichever amount is higher. Thus BNSF is assured it will receive all the insurance protection which is required for private successors to ODOT per the ODOT/BNSF agreement.

Finally, ODOT, which owns the property, is a major agency of the State of Oklahoma, and as it indicates in its filing, it is satisfied that Montoff is a qualified private entity. ODOT's satisfaction is entitled to the same respect STB would extend to a railroad's satisfaction.

Montoff has offered to supply further information to BNSF, but BNSF has so far not requested any further information or identified what information it thinks it needs.

For the foregoing reasons, Montoff does not believe that BNSF has a serious basis for contending that Montoff is not qualified. Moreover, any lack of information to make that determination on the part of BNSF would appear to be due to BNSF's failure to make inquiry. BNSF cannot assert an objection to Montoff's qualifications when it neither inquires of Montoff (or ODOT) nor specifies what it wants to proceed.

II.

According to BNSF's filing, BNSF is also concerned that when it sold the line to ODOT, it retained certain repurchase rights to the track and ties (salvage). BNSF claims it does not know if those rights will be honored. The Montoff/ODOT contract of course does not interfere with those rights; Montoff freely admits it will be acquiring subject to BNSF's rights.

This leads us to what Montoff understands to be the real dispute in this matter. It appears (based on conversations with BNSF's outside counsel, Mr. Morell), that BNSF views its contract with ODOT as providing that its salvage repurchase rights are triggered in the event of any sale of the line by ODOT, even if the sale, as here, is not for salvage purposes.

ODOT and Montoff take a different view of the matter. ODOT and Montoff view BNSF's contractual repurchase right as triggered only if ODOT salvages the track for itself, or sells the track for salvage by another. Since the sale to Montoff is not for salvage,¹ it does not trigger BNSF's salvage repurchase right. Moreover, the joint motion for substitution and e-mails preceding it were a standard and contractually sufficient notice procedure in the circumstances, concerning which no offense was intended nor should be taken.

In short, Montoff understands that BNSF's hesitancy to approve the substitution of trail managers arises solely from a possible contract dispute between BNSF and ODOT over the meaning of the BNSF/ODOT contract in terms of whether a triggering event for BNSF's repurchase right has occurred.

¹ Montoff is not a salvage company, nor financed by one, nor an agent for one, nor does it have any deal with one. Montoff intends at this time to develop the rail line initially for car storage. If Montoff ever sought to salvage the line, it would of course do so consistent with the repurchase right specified in the underlying ODOT/BNSF transaction.

Montoff has ascertained from BNSF that BNSF has no interest in reactivating the line. Moreover, BNSF has advised Montoff that BNSF is not interested in use of the line for car storage itself.

Mr. Morell has advised that BNSF is evaluating whether formally to claim that the sale to Montoff triggers the BNSF repurchase right, to assert such right, and to attempt to salvage the track (or presumably sell the track to salvage companies).

If BNSF formally makes such a claim and otherwise seeks to salvage the line or sell it for salvage, BNSF's action would preclude Montoff's use of the track for car storage, to Montoff's detriment under its contract with ODOT. Montoff understands (indeed has been assured by ODOT's representatives) that any such salvage by BNSF also would be fundamentally incompatible with ODOT's purpose in entering into its agreement with BNSF in the first place. ODOT advises Montoff that ODOT bought the line to keep it intact for some rail use, not to have the rail removed by BNSF should ODOT find an acceptable rail use for the line.² ODOT has further advised Montoff that it will dispute any claim by BNSF that the sale to Montoff triggers a salvage repurchase right by BNSF under the ODOT/BNSF contract.

BNSF counsel Morell advised Montoff's counsel that he expects BNSF to be in a position to further clarify its position soon. After discussions with counsel for ODOT, counsel for Montoff is authorized to represent that ODOT and Montoff as a courtesy to BNSF do not object to a brief postponement until October 15, 2009, for issuance of a replacement NITU providing for Montoff as the substitute trail manager. This postponement

² It would be very ironic for BNSF to preclude a rail use of a railbanked line by asserting a right to tear out the track, thus precluding such use.

should allow BNSF to complete its deliberations and hopefully to permit amicable resolution of this matter.

Montoff is concerned about further delays because there is a serious wash-out on the line at the Cimarron River and a damaged bridge near Guthrie. Both these matters should be addressed in this construction season in order to avoid potential harm to third parties, as well as additional damage to the line, during the spring flood season.

Ultimately, the resolution of a dispute over contractual repurchase right such as appears to be the crux of BNSF's objections is a matter for local law and courts. In such cases, STB issues such orders as are required so a railroad cannot avoid liability for a breach of contract by asserting federal preemption due to lack of an STB order authorizing a rail line transfer which it would otherwise be contractually obligated to permit. See, e.g., City of Alameda - Acquisition Exemption - Alameda Beltline, F.D. 34798, served April 3, 2006. Applying that rule here, the appropriate course would be to grant the motion for substitution of trail managers effective on closing of the ODOT/Montoff transaction, and then the parties can proceed to resolve their contract dispute in the appropriate local forum under Oklahoma law.

Conclusion

The issues between BNSF, ODOT and Montoff can hopefully be amicably resolved prior to October 15, and the parties can so advise the Board. In order to permit this opportunity to occur

without undue strain on the Board's resources, Montoff (with ODOT consent) states that issuance of a replacement NITU effective October 15, 2009, is appropriate.

Respectfully submitted,

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Certificate of Service

I hereby certify service this 24th day of September, 2009, upon Karl Morell, Esq., Ball Janik, 1455 F Street, N.W., Suite 225, Washington, D.C. 20005, and by courtesy email addressed to Kmorell@dc.bjllp.com, and upon Eric Hocky, counsel for ODOT, at Thorp Reed & Armstrong, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103, with courtesy email to ehocky@thorpreed.com.

Charles H. Montange
